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Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. [redacted] 88

HUNTER AND CO., INC., an Illinois corporation,
Petitioner,

vs.

VILLAGE OF BELLWOOD,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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OCTOBER TERM, A. D. 1940.

No. 1061.

HUNTER AND CO., INC.,
an Illinois corporation,
Petitioner,

vs.

VILLAGE OF BELLWOOD,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

FOREWORD.

Respondent, Village of Bellwood, deems it necessary for a proper understanding of the issues to state the following supplemental facts. Hunter and Company, Inc., petitioner, is not the legal owner of any property assessed in the original special assessment proceeding known as Bellwood Special Assessment No. 100. Arthur M. Hun-

ter, Secretary and Treasurer of Hunter and Company, Inc., testified that Cecil Whitehurst of Kansas City, Missouri, an associate, was the legal owner of lot 149 (Rec. 93). Lot 148 is owned by Mr. Hunter's wife, and the title appears in the name of Millicent Mary Price, which was the name of his wife prior to her marriage (Rec. 92). Both of these lots are vacant (Rec. 92). According to Mr. Hunter's testimony, the corporation had an interest in the profits to be derived. He was not sure but thought it was either fifty per cent (50%) or one-third (⅓) of the profits. Mr. Langworthy, Attorney for the Village, objected to this testimony on the ground that the contract was the best evidence to which the Court agreed (Rec. 82).

On cross-examination, Mr. Hunter testified that as a side line his company was in the business of servicing the property owners by purchasing bonds and paying the property owners' special assessment bills at a discount to them; that the bonds were bought at a discount by the company and the company made a profit on the transaction (Rec. 88-91).

Mr. Hunter stated that the coupons which the company held payable out of Special Assessment No. 41 had been cut from bonds that Hunter and Company, Inc., had purchased in the interests of certain taxpayers, and surrendered to the Village in payment of installments of Assessment No. 41 (Rec. 84). The Village of Bellwood did not allow Hunter and Company, Inc., to surrender and cancel the $30.00 in interest coupons (Rec. 83-84). $174.00 of interest coupons, payable out of Special Assessment No. 51896, were likewise cut from bonds that Hunter and Company, Inc., had surrendered in payment of certain property owners' special assessments in that proceeding (Rec. 85). $180.00 worth of

coupons payable out of Special Assessment No. 89 were likewise detached from bonds applied in payment of certain property owners' assessments in that proceeding (Rec. 87). Hunter and Company, Inc., owned $4,353.00 worth of interest coupons payable out of Special Assessment Warrant No. 60625, which coupons were also detached from bonds that had been applied in payment of certain property owners' assessments in that warrant (Rec. 87).

Hunter and Company, Inc., objector-appellant, filed no objections as an alleged property owner. The objections filed relate solely to Hunter and Company, Inc., as the owner of certain coupons and certain bonds payable out of special assessment warrants which are not involved in this proceeding. In our argument we shall state the objections which were presented in the trial court.

SUMMARY OF THE ARGUMENT.

I.

The 1933 amendment adding Section 86a to the Local Improvement Act does not impair the obligation of contract and deprive bondholders of property without due process of law.

1. The petitioner, Hunter & Company, Inc., prosecuted its appeal to the Supreme Court of the State of Illinois not as a property owner or as the owner of securities payable out of special assessment warrant 100, but as the owner of certain interest coupons and certain bonds payable out of special assessment warrants numbered 41, 51896, 89 and 60625.
2. Under the provisions of the Local Improvement Act of the State of Illinois each special assessment proceeding is separate and distinct from all others.
3. The holders of special assessment bonds made payable out of one proceeding have no right to the moneys collected in any other proceeding. Consequently, Hunter and Company, Inc., has no right, claim or interest in the funds collected in special assessment warrant 100.
4. Under Section 86a it is specifically provided that the court having jurisdiction of the original assessment proceeding is the only one in which the securities relating to that proceeding can be refunded.
5. Municipalities in Cook County as well as the Village of Bellwood have had special assessment proceedings confirmed not only in the County Court of Cook

County but also in the Circuit Court and Superior Court of Cook County. Consequently, it is obvious that the bondholders of an original assessment proceeding filed in a particular court cannot interfere with special assessment proceedings filed in other courts so as to refund all outstanding special assessment bonds in those proceedings.

6. If petitioner's contentions were followed, the refunding of bonds covering a single lot in one special assessment proceeding, if that same lot were assessed in another special assessment proceeding, might eventually, by reason of overlapping special assessment proceedings on the same lots in different special assessment districts, require the refunding of all the outstanding securities in every special assessment proceeding in the entire village.
7. The jurisdictional requirement of refunding special assessment bonds in the court having jurisdiction of the original assessment disproves petitioner's contention that all special assessment warrants relating to the same lot must be refunded since many of the special assessment proceedings are filed in different courts. The bondholders whose bonds are refundable in one court have no standing in another court.
8. The requirement that the holders of 75% of the bonds outstanding in any particular special assessment warrant must petition the municipality to refund special assessment bonds is a reasonable requirement because it indicates to the municipality sufficient bondholders are willing to refund so as to warrant corporate action.
9. The law is well settled in Illinois that the Legisla-

ture under the constitution has power to authorize cities and villages to refund a bond issue. (*Hoehamer* v. *Elmwood Park*, 361 Ill. 422, 430.)

10. The cases relied on by petitioner prove respondent's contention that the refunding of a special assessment is limited to the particular warrant or the installments of that warrant and cannot be extended to include other warrants.

II.

Section 86a of the Local Improvement Act is constitutional.

1. The provisions of Section 86a give bondholders in any special assessment proceeding the right to refund without discrimination.
2. The requirement that the holders of 75% of outstanding securities must petition a municipality to refund all of the installments of a special assessment warrant, or the holders of 75% of the securities in any one installment of such a warrant, is not arbitrary or an unreasonable classification.
3. The funding and refunding of outstanding securities by a certain number of the holders of such securities has been authorized under Federal bankruptcy acts and such legislation has met the approval of this Court.

ARGUMENT.

I.

The 1933 amendment adding Section 86a to the Local Improvement Act does not impair the obligation of contract and deprive bondholders of property without due process of law.

The petitioner, Hunter and Company, Inc., a corporation, and the only objector in the trial court to the extension of Bellwood Special Assessment Warrant No. 100, prosecuted its appeal to the Supreme Court of the State of Illinois, not as a property owner, but as the owner of $30.00 interest coupons payable out of Special Assessment Warrant No. 41, $174.00 interest coupons payable out of Special Assessment Warrant No. 51896, one bond having a balance due of $420.00 and $180.00 interest coupons payable out of Special Assessment Warrant No. 89, and one bond in the sum of $500.00 and interest coupons in the sum of $4,353.00, payable out of Special Assessment Warrant No. 60625 (Abst. 26).

Hunter and Company, Inc., owns no bonds or interest coupons payable out of Special Assessment Warrant No. 100.

The objections filed by Hunter and Company, Inc., in this proceeding to the refunding of the securities issued and made payable out of the original proceeding, briefly stated are these:

First: It is claimed that the proposed refunding plan is inequitable and unjust, and impairs the obligation of a

contract for the reason that if the refunding is granted, Hunter and Company, Inc., as a holder of coupons and bonds *in other special assesesment warrants,* and all of the other bondholders who have bonds and coupons payable out of *other special assessment warrants* will be put into a position subject and inferior to the lien of the refunded Special Assessment No. 100; that the holders of the bonds issued in the refunding of Special Assessment No. 100 will be put in a preferential position over and above bonds payable out of other special assessment funds in the Village, and would render worthless all of the other bonds.

Second: It is further urged that if Special Assessment Warrant No. 100 is refunded, the bondholders having bonds *in other special assessment warrants* have been deprived of their property without due process of law, and that the special assessment bonds owned by Hunter and Company, Inc., and all other holders of bonds *in other special assessment warrants* would have the obligations of these contracts impaired.

Third: It is claimed that the ordinance passed by the Village of Bellwood refunding Special Assessment Warrant No. 100 is unconstitutional and void because *other unpaid special assessment bonds in other special assessment warrants will still be outstanding and not refunded.*

Fourth: Finally, it is claimed Section 86a is unconstitutional and void because it requires the village board to pass refunding ordinances whenever 75% of the holders of the securities payable from any assessment or installment or installments of an assessment petition therefor. It is claimed the use of the percentage 75 is arbitrary and bears no relation to the matter dealt with in Section 86a.

The specifications of errors in petitioner's brief follow the foregoing objections. In order that this Honorable Court may be apprised of the nature of a special proceeding under the Local Improvement Act of the State of Illinois a consideration of the fundamental rules laid down by the Illinois Supreme Court will be helpful. A special assessment has been defined by the Illinois Supreme Court to be distinguishable from a general tax in that it is assessed or levied for a special purpose and not for a general purpose. It is not a charge on property which reduces its value. The assessment is made in the ratio of advantages accruing to the property in consequence of the improvement. In no case can the assessment exceed the advantages accruing to the property assessed. It is, therefore, regarded but an equivalent or compensation for the increased value the property will derive from the improvement the assessment is levied to discharge. (*People* v. *Brewer Estate,* 362 Ill. 88, 91.)

The term "local improvement" confines a special assessment to a particular locality and solely to the property whose value is enhanced by the benefits obtained from such improvement. In the case of *Village of Glencoe* v. *Hurford,* 317 Ill. 203, the court, on page 206, stated the general rule as follows:

> "Where the improvement enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality, it is a local improvement."
>
> *Village of Glencoe* v. *Hurford,* 317 Ill. 203, 206.

So far as practicable, all property affected bears the burden of a local improvement equally, but this principle of uniformity and equality applies only to the property benefited by the local improvement and not to other property in the municipality. (*City of Chicago* v.

Smith, 310 Ill. 244, 245.) Corollary to this proposition is the rule that under the local improvement act property cannot be assessed more than it will be specially benefited; that the continuing test in special assessment proceedings, whether original or supplemental, is that the assessment shall not exceed the special benefit to the property assessed. (*Harmon* v. *Village of Arthur*, 309 Ill. 95, 98.)

The judgment in the original proceedings as to benefits on any piece of property stands *prima facie* as an adjudication of that question and conclusively as an absolute adjudication, if in the original proceeding it was specially found that the property would be benefited no more than the amount assessed against it. Under those circumstances, the judgment is *res judicata* on the question of benefits. (*City of Nokomis* v. *Zepp*, 246 Ill. 159, 166.)

Of equal significance is the effect which a judgment of confirmation has upon the property assessed. Under Section 56 of the Local Improvement Act it is specifically provided:

> "Such judgments shall have the effect of several judgments as to each tract or parcel of land assessed, * * *.
>
> "Such judgments shall be liens on behalf of the municipality making the improvement, for the payment of which said special tax or special assessment is levied, on the property assessed from the date thereof, to the same extent and of equal force and validity as a lien for the general taxes until such judgments are paid or the property against which any such judgment is entered is sold to pay the same."
>
> Illinois Revised Statutes (1939), Chap. 24, Par. 758, Sec. 56.

In discussing the matter of a special assessment proceeding and that such proceeding is limited solely to the property assessed, the court, in the case of *City of Chicago* v. *Partridge*, 248 Ill. 442, on page 453, stated the following:

> "In a special assessment proceeding a personal liability cannot be imposed upon the owner of property benefited by a local improvement. The purpose of the proceeding is to impose a burden or charge upon the property itself, which, if not removed by the owner, is to be satisfied by a sale of the property under authority conferred by law. Such proceeding is therefore denominated a proceeding *in rem*, meaning a proceeding against the property itself, as distinguished from a proceeding *in personam*, meaning a proceeding against the owner of the property. The *res*, however, is not the street to be improved but is the property upon which it is sought to place the burden or charge, and if all the essential steps provided by statute have been taken, a judgment entered therein, either confirming an assessment against the *res* or sustaining objections and dismissing the petition as to the *res*, is conclusive, so far as the *res* is concerned, against the whole world as to all matters determined in that proceeding. It is, however, always the judgment entered in a cause which constitutes the estoppel, and as the judgment entered in a special assessment proceeding is, in effect, a several judgment as to each tract or parcel of land assessed, it necessarily follows that, in so far as the judgment is concerned, each tract or parcel of land assessed is a sperate *res*, and that there is, in effect, a several judgment *in rem* as to each tract or parcel of land assessed; *and as the judgment of confirmation against one tract is in nowise affected by the reversal of that judgment as to another tract, or by a judgment entered in the same proceeding sustaining objections and dismissing the petition as to such other tract, it also necessarily follows that the judgment entered in the proceeding sustaining objections and dismissing the proceedings as to one tract cannot be successfully*

interposed as an estoppel or bar to an assessment against another tract in a subsequent proceeding." (Italics ours.)

Chicago v. *Partridge*, 248 Ill. 442, 453, 454.
Phelps v. *Mattoon*, 177 Ill. 169, 170.

It is manifest that under the law in Illinois, each special assessment proceeding is separate and distinct; that only the property assessed is involved and the assessments to be paid, for a particular improvement, are in no way dependent upon or correlated to other special assessments that may have been levied against the same property. In determining whether the property to be assessed is benefited to the extent of the assessment levied, it is proper to consider other improvements, and the cost of other improvements, whether constructed or to be constructed in determining the amount which the property would be benefited by the improvement involved. (*Village of DesPlaines* v. *Winkelman*,270 Ill. 149, 156.) Thus the assessment against any one piece of property cannot exceed the benefit that that property derives from the improvement after having considered all proper elements. The assessment, therefore, upon confirmation is conclusive and is not subject to collateral attack. (*People* v. *Brewer Estate*, 362 Ill. 88, 92; *Fox* v. *Maxwell*, 353 Ill. 172, 179.)

Furthermore, Section 86a of the Local Improvement Act specifically states:

"The ordinance for such refunding shall refer to the original assessment proceeding and no estimate or recommendation by the Board of Local Improvements shall be required. The court shall hear the proceeding in a summary manner without a jury *and there shall be no hearing on benefits* * * *." (Italics ours.)

Illinois Revised Statutes (1939), Chap. 24, Par. 792a, Sec. 86a.

In the instant case, Hunter and Company, Inc., as objector, attempted to have the County Court in this proceeding, involving the refunding of Special Assessment Warrant No. 100, go into the question of comparative assessments made in the four other proceedings in which Hunter and Company hold bonds. This, obviously, the County Court properly refused to do because it was in effect an attempt to reconsider the question of benefits—not only in the assessment being refunded, but in four extraneous proceedings.

The petitioner asserts the unpaid amounts of the four special assessments, in which petitioner claimed to hold securities, roughly equal the amount of unpaid assessment No. 100, as to the average lot against which the assessments were levied. Other statements of fact are asserted by petitioner based upon the testimony of the witness, Hunter. Witness Hunter testified further that the average lot was worth from five hundred to seven hundred fifty dollars (Tr. 29) but admitted that he had previously testified that a part of the property was worth a hundred dollars a foot (Tr. 29). The four assessments in which the petitioner claimed to own securities were 41, 89, 51896 and 60625. No competent evidence was offered by petitioner to support most of the conclusions asserted.

The proceedings involving No. 60625 were before the Supreme Court in the case of *Johnson* v. *Village of Bellwood*, 338 Ill. 605. Assessment No. 51896 is nearly ten thousand numbers less than No. 60625 and was for a sanitary sewer serving not only the property involved in Assessment No. 100, but all the property in the village both North and South of the district assessed in No. 100, an area at least five times as large, if not ten times as large. Assessment No. 60625, as appears from

the opinion in *Johnson* v. *Village of Bellwood, supra,* served nearly the entire village.

Assessment No. 89 was an electric light system which served almost all of the village west of the railroad while assessment No. 41 was for water main serving perhaps about four times as much property as is served by Assessment No. 100. There was no competent evidence submitted by petitioner of the actual unpaid installments in any of these four assessments and what property, if any, in the assessment district affected by Assessment No. 100 is now delinquent in connection with the four assessments. No doubt a number of lots now delinquent in the district included in assessment No. 100 are also delinquent in some other assessments. No doubt some of the delinquent lots are also delinquent in payment of general taxes.

It seems to be petitioner's contention that Section 86a requires the refunding of *all* special assessment warrants where assessments have been levied upon the same property. Appellant argues that if the court construes Section 86a to permit the bondholders in one special assessment warrant to refund without compelling the bondholders in that specific warrant to refund at the same time all other special assessment warrants levied against the same property, a preference will be given the bondholders who are refunding the one wararnt over bondholders who are not refunding other warrants. In other words, if we carry petitioner's idea to an ultimate conclusion, it would mean that bondholders who, under the provisions of Section 86a, sought a refunding of particular bonds in a special assessment warrant, would be required under certain circumstances to refund every special assessment proceeding in a village or city.

For example, if Lot "A" was assessed in the original

Special Assessment proceeding No. 100 and was also assessed in the original Special Assessment proceeding No. 60625, but happened to be the only lot assessed in the district involving Special Assessment No. 60625, then both proceedings, according to petitioner's contention, would have to be refunded by the bondholders having bonds only in Special Assessment proceeding No. 100. Let us assume further that Lot "B" in No. 60625 happened to be the only lot assessed in the district involving Special Assessment proceeding No. 41, and Lot "C" assessed in Special Assessment proceeding No. 41 the only lot assessed in Special Assessment No. 45, it is obvious that if all of these different districts representing different special assessment proceedings had to be refunded by the holders of bonds in Special Assessment No. 100, because Lot "A" happened to be the only lot assessed in Special Assessment proceeding 60625, the refunding of a single Special Assessment proceeding might easily be extended to include all of the special assessments of the Village. We submit that no reasonable construction of Section 86a would contemplate the results and confusion attending petitioner's interpretation of Section 86a.

The payment of one special assessment on a designated piece of property has nothing to do with an assessment levied against the same property under a different proceeding. Section 86 of the Local Improvement Act authorizes the issuance of bonds for the purpose of anticipating the collection of the second and succeeding installments to pay for the cost of the construction of the improvement for which the proceeding had been filed. It is specifically provided in Section 86:

> "Each bond shall state on its face out of which installment it is payable, and shall state, by num-

ber or other designation, the assessment to which such installment belongs. The principal of such bonds shall not exceed, in the aggregate, the amount of such deferred intsallments, and shall be divided into as many series as there are deferred installments * * *."

The Illinois Supreme Court and the Appellate Court of Illinois have construed this Section to mean that the installments are the only source of payment of the bonds, and when they are collected by the municipality the money received becomes a trust fund for the payment of the bonds to the holders, without preference among them. (*Rothschild* v. *Village of Calumet Park*, 350 Ill. 330, 339.) A village is not authorized to use the moneys collected in one installment for any purpose except to pay the honds issued against that installment, with interest thereon (*Bankers Life Company* v. *Village of Elmwood Park*, 280 Ill. App. 524, 526). Obviously, the only bondholders having any interest in a special assessment proceeding *are those who hold bonds payable out of the installments of such a special assessment warrant.*

There is nothing in the Local Improvement Act which provides, and it was never contemplated, that the holders of bonds payable out of one special assessment warrant have any interest in the proceeds or funds collected in another special assessment proceeding. Any surplus accruing in any warrant under the provisions of Section 86 are available for the payment of any bond or voucher payable out of an installment in the particular warrant where sufficient moneys have not been collected to pay such vouchers or bonds. And Section 93 provides that if, upon final settlement with the contractor for any improvement and full payment of all vouchers or bonds, issued on account of such contract, there shall be any surplus remaining in such special assessment, it shall be

the duty of the proper authorities of the municipality to at once cause a rebate to be declared upon each lot, block, tract or parcel of land assessed of its *pro rata* proportion of such surplus. *Consequently, Hunter and Company, Inc., appellant, who have no bonds or coupons payable out of any of the installments of Special Assessment Warrant No. 100, is in no way interested in or deprived of any rights by reason of the refunding of Special Assessment Warrant No. 100.*

Both from a legal and factual consideration is it apparent that the general provisions of the Local Improvement Act contemplated each special assessment proceeding to be independent of any and all other special assessment warrants and the provisions of Section 86a confirm this to be true. At the very outset, Section 86a provides:

> "*The court having jurisdiction of the original assessment proceeding* is hereby authorized at any time after the assessment has been confirmed to extend the time of payment of assessments, or any installment or installments thereof, whether due or not due, heretofore or hereafter levied, and in case securities have been issued, to refund the securities and past due interest thereon, heretofore or hereafter issued in anticipation of the collection of the assessments or any installment thereof levied under the provisions of this Act, * * *." (Italics ours.)

The foregoing provision is jurisdictional. Consequently, a refunding proceeding can only be had in the court, where the original assessment proceeding was confirmed. If petitioner's contentions as to the refunding of all special assessment warrants which may have been assessed on one or more pieces of property in different special assessment proceedings were to prevail, then a jurisdictional question would immediately arise inasmuch as it is well known that municipalities very often have

assessments confirmed on the same property by filing proceedings in different courts. This Court will take judicial notice of the fact that municipalities in Cook County for many years past have had special assessments confirmed in the County Court of Cook County as well as in the Circuit Court and Superior Court of Cook County. (See *Village of Bellwood* v. *Galt*, 321 Ill. 504.) While in the instant case the special assessment proceedings in which Hunter and Company, Inc., holds certain coupons are proceedings which were confirmed in the County Court of Cook County, yet if Section 86a were construed, as maintained by petitioner, to require the refunding of all special assessment warrants, the impossibility of such refundings where the original proceedings were filed in different courts is manifest in view of the jurisdictional requirement that refunding must be had in the court that confirmed the original assessment. Furthermore, the seventy-five per cent (75%) of the holders of any securities issued against any assessment or any installment or installments thereof, seeking the refunding of securities in anticipation of the collection of the special assessment or any of the installments thereof, the time of payment of which is to be extended, as required by Section 86a, *can refer only to the bondholders of an original assessment proceeding, filed in a particular court, and not to all special assessment proceedings, some of which may have been filed in different courts.* The bondholders whose bonds are refundable in one court would have no standing in another court.

Section 86a does not deprive Hunter and Company, Inc., or any other bondholder, from petitioning the municipality for a refunding of the special assessments in which they are interested. Petitioner claims that to require a majority of seventy-five per cent (75%) of the

holders of outstanding securities to join in a petition to the municipality as a condition precedent to extension and refunding is an arbitrary, unreasonable and discriminatory exercise of legislative power and, therefore, unconstitutional. However, petitioner, in support of its argument, on page 18 of its brief, states the following:

> "There are many instances where bondholders will refuse to initiate any action on the grounds that it might subject them to burdens of time and expense, whereas if the extension proceeding could be commenced by one or a few of the scattered bondholders, and the only thing remaining for other bondholders to do would be to deposit their bonds in some depository named by the court for the purpose of exchanging them for new and current obligations, this proceeding might be successfully followed in innumerable special assessments."

If Section 86a provided what petitioner suggests, and compelled bondholders, unwilling, to give up their old bonds in exchange for new refunding bonds, it undoubtedly would be unconstitutional not only on the grounds of impairing the obligations of a contract, but for taking a person's property without due process of law. As it is, Section 86a not only requires a petition of seventy-five per cent (75%) of the holders of the bonds in any particular special assessment warrant before a municipality is obliged to act, but it also provides that *"No judgment confirming any proceeding under this Act shall be entered until all outstanding securities shall have been either deposited in the court or with some depository under an escrow agreement approved by the court."* In other words, Section 86a in its provisions carefully protects all of the bondholders having bonds in the special assessment warrant that is being refunded. No single bondholder, not even a small minority, can compel the bondholders to give up their bonds, as suggested by peti-

tioner. Section 86a virtually requires the consent of all bondholders of a particular special assessment warrant being refunded to consent to such refunding. Since, under the provisions of Section 86a, a bondholder having an interest in the refunding proceeding has no cause to complain and his rights are fully protected by the law *a fortiori*, a person who owns no bonds in the warrant and has no rights in the proceeding certainly has no reason for claiming the section to be unconstitutional.

> "One has no constitutional right to a 'remedy' against the lawful conduct of another."
>
> *Senn* v. *Tile Layers' Protective Union Local No. 5*, 301 U. S. 468, 483; 57 Sup. Ct. Rep. 857, 864.

Petitioner complains that the refunding of Bellwood Special Assessment No. 100 gives the holders of the refunded bonds a preferential position over the holders of bonds in other special assessment warrants; that Section 86a therefore confers new rights upon one group of bondholders to the positive detriment and to the impairment of obligation of the other groups of bondholders where there are numerous installments of several different special assessments due upon the same lot or groups of lots, and where, by reason of concentrated holdings only one special assessment is extended and its securities refunded. The contention made in support of this statement is that under the doctrine that the later year's tax constitutes a prior lien, the refunding in this proceeding establishes the lien of Bellwood Special Assessment No. 100 as a first and prior lien and thereby subordinates the lien of all of the other special assessment installments to it. This contention has been decided adversely to petitioner in the case of *People* v. *Taylorville*, 371 Ill. 280, 286-287.

From what we have already said, it is obvious that Section 86a does not confer new rights upon one group of bondholders to the detriment of others. The right to refund is common to all bondholders. Not only does Section 86a permit the refunding of an entire special assessment warrant, but it also permits the refunding of "any assessment or any installment or installments." Under this provision, bondholders of a single installment of any special assessment warrant have the right to have that installment refunded even though the holders of bonds in the other installments decline to join such refunding proceeding. This provision of Section 86a minimizes within reasonable bounds the difficulties that bondholders may have in seeking the refunding of a special assessment warrant.

Petitioner contends further that at the time the Village of Bellwood issued the bonds involved in this proceeding, no provision whatsoever existed in the statutes for extension and refunding of these assessments. Counsel for petitioner argues that because no refunding statute existed, it was immaterial to a purchaser whether he bought all of the bonds of a single issue. And, he adds, if there had been statutory provision for refunding bonds, such purchaser may have made his purchases with a view to protecting himself against the contingency of having other special assessments covering the same property endanger the bonds he held as a primary security by either refunding or foreclosure proceedings. There was no showing in the County Court that petitioner purchased his bonds and coupons prior to the effective date of Section 86a. This contention is highly speculative. We have already pointed out that under the law any bonds, whether purchased singly or all the bonds of an issue, the value of such bonds have in no way been impaired by the enactment of Section

86a. The fact that petitioner's bonds may have gone into default and that a foreclosure proceeding may be imminent does not in any way militate against the right of the legislature to provide during a period of economic distress for the refunding of such securities in order to aid the property owner in meeting his future payments. The Illinois Supreme Court, in the case of *Hoehamer* v. *Village of Elmwood Park,* 361 Ill. 422, on page 430, stated:

> "The refunding of a municipal debt is not a new thing in this State, and it is well settled that the legislature, under the constitution, has power to authorize cities and villages to refund a bond issue. The right of the legislature to pass the Local Improvement act empowering municipalities to issue improvement bonds is not questioned. Since the power to issue bonds exists, it must necessarily follow that the legislature has power to authorize a municipality to refund those bonds when, through an economic depression or otherwise, they are in default."
>
> *Hoehamer* v. *Elmwood Park,* 361 Ill. 422, 430.

The fact that Section 86a authorizes the refunding of special assessment bonds does not impose any new rights on one group of bondholders to the disadvantage of others. The authorization to refund is delegated to the municipality and can be acted upon only under the conditions as prescribed by Section 86a. Its conditions appertain to the voluntary acts of all of the bondholders interested in a particular special assessment proceeding. The rights under Section 86a are accorded to all bondholders alike. Therefore, whether the purchaser owns only one or all of the bonds of a particular issue, his rights are coextensive with all other bondholders, and he cannot be compelled under the provisions of Section 86a to do anything contrary to his own wishes. To this extent, Section 86a has jealously guarded the interest of the minority, and there is nothing in the Section which forces the will of the majority upon the minority, or even a single bondholder.

Counsel for petitioner refers to the case of *Friedman* v. *City of Chicago*, 374 Ill. 545. The opinion handed down by the court in no way has any application to the issues raised in this matter. Counsel cites the case on the proposition "that where a retroactive statute makes it possible to extend one out of several special assessments, making its installments a current and prior lien and where, by reason of the restrictive provisions of the refunding act any holder of a single bond is refused access to the privilege of its provisions and is unable to have his bond refunded, the retroactive statute permitting extension creates an arbitrary discrimination, not before existing, and hence violates the constitutional prohibition on taking property without due process and impairs the obligation of contract. Such statute must therefore be held unconstitutional and void." (Petitioner's brief, page 13.)

The foregoing statement is obviously a distortion and misconception of Section 86a as well as the facts involved in the present matter. It is a general rule of law, as cited in Corpus Juris, Vol. 12, par. 778, p. 1084, that a statute is not retrospective merely because it relates to antecedent transactions, where it does not change their legal effect. While it is true that Section 86a relates to antecedent transactions such as the original special assessment proceeding, it does not, however, change the legal effect of the original proceeding nor does it change the effect of the obligations issued in the form of bonds. Section 86a permits the extension of the time of payment of the installments out of which the original bonds were payable by extending the time of payment of those installments and by issuing refunding bonds in lieu of the original, with no greater rights and with no different security from that of the original lien, but even this can be done

only by and with the consent of all the bondholders whose bonds are being refunded.

Counsel for petitioner cites the case of *Village of Downers Grove* v. *Harley*, 372 Ill. 586, quoting from that decision and italicizing the following words:

> "* * *, provided that all the remaining bonds have been paid or not prejudicially affected in any way by the refunding of a part of the installments."

Counsel for petitioner, after quoting the above words, concludes:

> "The *Harley case* involved a proceeding to extend six of the installments of a given special assessment leaving four other installments unextended. The situation is directly analogous to the present case where all of the installments of Special Assessment Number 100 are sought to be extended, leaving four other special assessments unpaid and unextended."

The fallacy of this contention is in the fact that in the *Harley case only one special assessment warrant was being refunded.* The special assessment involved was Downers Grove Special Assessment No. 123. What is said in the opinion of the Illinois Supreme Court in the *Harley case* confirms what we have heretofore stated with reference to the rights of bondholders in a particular special assessment warrant.

The *Harley case* is a sequel to the case of *Thayer* v. *Village of Downers Grove*, 369 Ill. 334. In the latter case, the County Court of DuPage County had confirmed a judgment extending payments of Special Assessment No. 123 for a period of fifteen years and directing the issuance of bonds redeemable within that time, and bearing interest at five per cent (5%), to replace bonds outstanding. *All of the bondholders had not joined in that particular proceeding.* Bondholders who had not partici-

pated in the proceeding made a motion to vacate the the judgment confirming the special assessments, as extended, on the ground that the judgment of confirmation had been procured by fraud and that the holders of seventy-five per cent (75%) of the bonds had not petitioned the Village Council, and further for the reason that not all of the bondholders were willing to deposit their bonds as the petition alleged. The County Court of Du Page County sustained the motion to vacate, and the Village of Downers Grove appealed. The Illinois Supreme Court, on appeal, affirmed the holding of the County Court to the effect that the refunding of Special Assessment No. 123 had not been in compliance with the requirements of Section 86a and, therefore, the County Court did not have jurisdiction to proceed; that a participation of all of the bondholders in the proceeding was necessary in order to make such proceeding valid.

When the *Thayer case* was remanded, the Village then attempted in the *Harley case* to refund those installments whose bondholders were willing to refund, and excluded the installments in which bonds were held by the objecting bondholders who had appeared in the *Thayer case*. However, in the *Harley case,* an attempt was made to apply the surplus accrued in installments, where all the principal and interest had been paid, to the installments which were being refunded, without applying *pro rata* the surplus on hand to the installments which were not being refunded. This the Court held could not be done.

In the case of *Scribner* v. *Downers Grove,* 372 Ill. 614, the Court held that the non-participating bondholders who were not interested in having the installments refunded out of which their bonds were payable, had a vested right in the surplus funds accruing in the warrant, and that to apply the surplus funds to only the installments that were being refunded was depriving the bond-

hodlders of a vested interest in those funds. *In the instant matter, Hunter and Company, Inc., has no vested right in the funds of Bellwood Special Assessment No. 100. Whatever rights it has relate solely to the respective warrants out of which its coupons and bonds are payable.* Neither the *Harley case* nor the *Scribner case* has any application to the instant matter, and, therefore, the language quoted by appellant from the *Harley case* has no bearing on the issue in this case.

Counsel for petitioner cites the case of *W. B. Worthen Company, Trustee* v. *Kavanaugh, Trustee*, 295 U. S. 56, in support of the proposition that "At the time of the execution of the bonds in question the Statutes of Illinois contained no provisions which would render bonds sold individually or in small blocks as questionable security whereas the Statute later enacted puts such bonds at such a disadvantageous position that they become, under such Statute, very questionable security." We respectfully submit that no results as stated by counsel are created by reason of the enactment of Section 86a. The Illinois Supreme Court, in the *Scribner case, supra*, considered the *Worthen Company case* and held that it had no application to a refunding under Section 86a in that the violation of the substantive rights complained about in the *Worthen Company case* were fully protected under the provisions of Section 86a. As heretofore mentioned, the Illinois Supreme Court approved in the *Hoehamer case, supra*, the enactment of Section 86a as a means to relieve property owners who, because of economic conditions, were unable to pay their assessments. The purpose of Section 86a was to avoid foreclosure of special assessment liens and to aid both the property owner and the bondholder. Petitioner is not deprived of these rights and it has the same opportunity to have the special assessment war-

rants refunded in which it is interested as do the bondholders who hold the bonds in Special Assessment Warrant No. 100.

II.

Section 86a of the Local Improvement Act is constitutional.

Under this point petitioner contends that Section 86a is unconstitutional because it violates the 14th amendment to the Federal Constitution in that it denies equal protection of the law, and also violates Section 22 of Article 4 of the Constitution of the State of Illinois because it is special legislation granting special privileges to certain persons. As we understand counsel's argument, the provisions of Section 86a which require the holders of seventy-five per cent of any securities issued against any assessment, or any installment or installments, is an unreasonable and arbitrary classification. In support of petitioner's contention, the rule is cited from the case of *Michigan Millers Mutual Fire Insurance Company* v. *McDonough*, 358 Ill. 575, as follows:

> "To avoid falling within the constitutional inhibiti n of special legislation the classification of subjects or objects must be based upon some reasonable and substantial difference in kind, situation or circumstance bearing a proper relation to the purposes to be attained by the Statute."

Counsel also cites from the case of *People* v. *Seemann*, 302 Ill. 538, 547, the following:

> "A distinction in legislation is not arbitrary if any set of facts can reasonably be supposed to sustain it, but it must rest upon a reasonable basis, and a classification is not valid which has no reasonable basis but is essentially arbitrary."

The requirement that the bondholders of a special assessment proceeding should take certain steps as prescribed by Section 86a for the purpose of refunding their securities is in consonance with the foregoing rules. As we have heretofore pointed out, the bondholders in a particular special assessment warrant are the only ones who have any interest in the funds to be collected in that warrant for the retirement of their bonds.

It is claimed Section 86a is unconstitutional and void because it requires the village board to pass refunding ordinances whenever the holders of seventy-five per cent of the securities payable from any assessment or installment or installments of an assessment petition therefor. It is claimed the use of the seventy-five per cent is arbitrary and bears no relation to the matter dealt with by this legislation.

The general procedure provided for in Section 86a is first, that a petition be filed with the municipality by at least the holders of seventy-five per cent of the outstanding bonds; second, that, thereupon, a refunding ordinance be passed by the municipality, directing that a refunding petition be filed by the municipal authorities in the court having jurisdiction of the original assessment; that, thereafter, an opportunity is provided to procure consents from the remaining bondholders, if any, who did not join in the original petition (all of whom must deposit their securities before any judgment order of refunding can be entered); and finally, the entry of a judgment order of refunding is dependent upon the approval of one hundred per cent of the bondholders. In short, the holders of seventy-five per cent of the outstanding securities must consent to the plan before it can be even proposed, and one hundred per cent must join in the plan before it can be consummated. Abundant analogies are furnished by

various sections of the Federal Bankruptcy Act. For example, sections 401-404, entitled "Local Taxing Agencies", require the consent of not less than fifty-one per cent of the security-holders before a plan can be filed in court, and the consent of two-thirds is necessary to put the plan into operation. For constitutional reasons, Section 86a requires the ultimate consent of one hundred per cent, but only seventy-five per cent are needed to initiate the proceeding.

It seems to us the per cent might have been fifty or ninety or one hundred. It seems the legislature was justified in making the per cent seventy-five or even larger because the Act requires all security holders (whose securities are payable from the assessment or installment or installments to be extended and refunded) must ultimately consent by depositing the securities as provided in the Act or be paid off.

It doubtless was considered that the village ought not to be required to pass ordinances until enough owners joined in the petition to make it fairly probable that all would ultimately consent and it, therefore, would seem that there is a direct relation between the requirement of seventy-five per cent and the legislation then being dealt with.

It therefore seems to us that the foregoing authorities cited on this point by counsel for petitioner are not applicable to the facts dealt with in this legislation.

Since Section 86a provides that the holders of seventy-five per cent of the bonds have the right to apply to the municipality for a refunding, and further provides that no refunding can be made unless all of the bondholders in that particular warrant consent to the refunding of such a proceeding, certainly these provisions cannot be said to be arbitrary and unreasonable. On the other hand, it

would be extremely unreasonable if Section 86a required the bondholders in one warrant in which they had an interest to refund other warrants in which they had no interest.

The case of *Sturges and Burn Manufacturing Company* v. *Pastel*, 301 Ill. 253, and the case of *Binney* v. *Long*, 299 U. S. 280, are not in point, and have nothing to do with the questions raised by petitioner in its appeal.

CONCLUSION.

Respondent respectfully submits that Section 86a of the Local Improvement Act is constitutional and that the Supreme Court of the State of Illinois properly affirmed the judgment of the County Court of Cook County.

Wherefore, respondent prays that the application for writ of certiorari be denied.

Respectfully submitted,

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